IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

## No. 628

INTERSTATE COMMERCE COMMISSION, J. M. KURN AND JOHN G. LONSDALE, TRUSTEES OF THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ET AL.,

*Appellants,*

*vs.*

COLUMBUS AND GREENVILLE RAILWAY COMPANY,

*Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION.

**ON REARGUMENT.**

# BRIEF FOR THE COLUMBUS AND GREENVILLE RAILWAY COMPANY, APPELLEE.

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THE DUNLOP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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## BRIEF FOR THE COLUMBUS AND GREENVILLE RAILWAY COMPANY, APPELLEE.

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By leave of the Court first obtained, appellee submits this brief on the reargument of this case. Included in the appendix is the material requested by the Court at the reargument.

After the original argument of the case on April 7 and 8, 1943, it was by order of the Court restored to the docket

for reargument, with the request that counsel on the reargument direct their attention particularly to the following questions:

(1) Is freight tariff No. 81 in violation of any provision of the Interstate Commerce Act, as amended?

(2) Assuming that this question is answered in the affirmative, would the cancellation of this tariff operate unfairly and unreasonably in view of the outstanding cut-back tariffs on freight originating on carriers with which the Columbus and Greenville Railway competes?

(3) What considerations of law, procedure or policy may be urged against the Commission's following the procedure, prior to the cancellation of the tariff, of bringing other carriers into the proceeding pending before it, or into an independent proceeding, and in such proceeding making an appropriate adjustment of rates as between respondent and other carriers?

(4) Have the courts power to require the Commission to take such procedure?

(1)

Is freight tariff No. 81 in violation of any provision of the Interstate Commerce Act, as amended?

The appellee, by promulgating its tariff No. 81, in order to meet the competitive situation created by the "cut-back rates" of its competing trunk line carriers, Exhibits D and E (R. 18 and 24), was acting within its common law right to manage its property upon a plan which to it seemed necessary, sound and proper. Its right to initiate the tariff is confirmed by the decisions of this Court in *Interstate Commerce Commission* v. *Chicago Great Western Railway Company, et al.*, 209 U. S. 108, 118; *United States* v. *Illinois Central Railroad Company*, 263 U. S. 515.

Unless the tariff No. 81 violates some express provision

of the Interstate Commerce Act, as amended, the decision of the lower court holding that it did not must be sustained.

In the argument of this case, we insist that the appellants, along with the appellee, are confined to the facts as made by the record, and that there being no issue of disputed fact and the correctness of the Commission's findings therefrom, the Court's inquiry is confined to the correctness of the legal principles adopted by the Commission as a basis for reaching its conclusion.

These facts are not disputed: That the rates for the inbound movements of cottonseed are published in tariffs, local or joint, governing the movement to the mill point; that the rates on cottonseed products from the mill point are published in tariffs, local or joint, governing the movement from the mill point. (R. 8.) That the inbound shipments of seed move from origin points to the mills at the local rates under separate bills of lading. (R. 10.) That neither the cut-back tariff of appellee No. 81, nor the cut-back tariffs of appellants name rates by which the charge for the movement of the seed to the mill point is assessed. See Rule 30 (b), Illinois Central Tariff (R. 31, 47); Frisco Tariff, Item 5 (b) (R. 19); Columbus and Greenville Tariff, Item 5 (c) (R. 14). Neither the Illinois Central tariff nor the Frisco tariff shows the concurrence of any other carrier. The same is true of C. & G. tariff No. 81. The refunds or cut-back is exactly the same in amount in the tariffs of appellants and of appellee. (R. 9.)

At this point we wish to emphasize the fact that the appellants' tariffs do not limit the cut-back to seed which they originate but apply it to all seed that they move into the mill point, regardless of origin so long as they are the delivering carrier of the seed to the mill point. However, the quantum of the cut-back where the seed do not originate on appellants' lines is measured by the mileage from the junctions of connecting lines from which appellants

receive the seed shipments. We quote from Item 55, Frisco Freight Tariff No. 5162-T (R. 22):

> "Item 55—Shipments From Connecting Lines
>
> "The rates shown herein also apply from junctions of the St. Louis-San Francisco Railway Company with connecting lines on shipments originating at points on connecting lines from which no through net rates are published, subject to the rules herein."

Also we quote Rule 55 from Illinois Central Railroad Company tariff (R. 50):

> "Rule 55—Shipments From Connecting Lines
>
> "The rates published in Section No. 2 herein also apply from junctions of the Illinois Central Railroad, The Yazoo and Mississippi Valley Railroad, Fernwood, Columbia & Gulf Railroad, and or Gulf and Ship Island Railroad with connecting lines, on shipments originating at points on connecting lines from which no through net rates are published, subject to the rules herein."

This fact was called to the attention of the Court upon the reargument because, whether wittingly or unwittingly, the impression has been conveyed that a distinguishing line can be drawn between appellants' cut-back tariffs and appellee's cut-back tariff 81, in that the appellants' tariffs limit their cut-back or refund to seed originating on their line. This is not a fact. Hence the argument advanced by appellants that the rate, made up of the movement of seed to mill point from point of origin and the products from mill point under the joint tariffs to which appellee is also a party, is a through rate from origin of seed to destination of products, with orthodox privileges of milling in transit, is not correct.

It is true that the appellee, by its tariff I. C. C. No. 81, proposes to give to the shipper of the products manufactured from the rail seed the identical refund or cut-back that the appellants make under their individual cut-back tariffs, even though they did not move in over the line of

appellee. The Commission found that "the purpose of (appellee's) making the refund is to enable it to compete for traffic that might otherwise move outbound over the line that originated the seed." (R. 9.) Accurately speaking, the word "originated" has reference to the line delivering the seed to the mill point.

We further wish to call the Court's attention to the uncontradicted evidence contained in the unprinted record before the Court in I. & S. Docket No. 4599, that the oil mills located on appellee's line and at junction points with appellant carriers' lines had been in existence for thirty years or more prior to the appearance of cut-back tariffs in 1931, under the guise of truck competitive rates; that, prior to that time, appellant carriers and appellee had competed on equal terms for the outbound movement of products manufactured from cottonseed; and that the legality of the cut-back tariffs as such has never received the formal sanction of the Commission. In other words, they have not been put in issue, and even in the case at bar, the Commission avoids consideration of such tariffs in this language: "The legality of interveners' tariffs is not in issue." (R. 10.)

The Commission does say, however, that the purpose of appellant carriers' tariffs is to "induce the shipper to move the outbound products over their lines." (R. 9.) And they further found: "If it were not for the cut-back rates of the connecting lines, there would be no necessity for respondent's (appellee's) tariff as the inbound shipments move from origin points to the mills at the local rates under separate bills of lading." (R. 9-10.) But for the existence of the appellant trunk line cut-back tariffs, there would be no justification for the appellee's tariff 81, and same would never have been filed. The appellee insists, however, that it has a right to compete on equal terms from mill point to destination of the products where appellant carriers and appellee are parties

to through routes and joint rates covering these products as in the case at bar; that, when the seed move from origin points to the mills at the local rates under separate bills of lading, regardless of the carrier delivering the movement, the outbound traffic becomes free traffic in the sense in which that term was applied to the grain by the Supreme Court in *Atchison, T. & S. F. Railway Company* v. *United States*, 279 U. S. 768. Speaking of the attempted tie-up of outbound traffic by means of so-called transit tariffs, the Court said:

> "This convenient fiction is employed as a justification for the discrimination involved in giving rates lower than those ordinarily applicable to the service outbound. * * * There is no rule of law or practice which gives to a carrier the right to recapture traffic which it originates."

At the hearing in the case at bar, Stenographer's Minutes, pages 15-16, appellee committed itself to the proposition that it had no objection to the adoption by appellants or any connecting carrier of the same type of tariff here involved (I. C. C. No. 81); or, that it would eliminate cut-back features from its own rates and establish the so-called cut-back rates as the normal rate for the movement of seed if the connecting carriers would adopt this policy. We wish to emphasize this fact, for appellee has consistently contended that it is not seeking an advantage or preference that will be lost by the filing of a similar tariff by its competitors. Any charge that appellee by its tariff No. 81 is seeking an advantage over its competitors is without factual foundation.

We call the Court's attention to that part of our brief before the Commission entitled, "Cottonseed Allowances of the Columbus & Greenville Railway Company, Docket Number 28,590. Exceptions of Respondent to Report Proposed Herein by George M. Curtis, Examiner," at page 8 thereof, which was read to the Court at the original argument on April 8, 1943, and at the reargument on

May 13, 1943. Same appears as Exhibit A, appendix herein.

It is apparent that the appellants' cut-back tariffs gave an advantage to the shippers of cottonseed products processed from seed that they transported to the mill point, regardless of origin, even though the products moved from the mill point over joint rates published in joint tariffs to which appellee was a party and that, as to these products, the appellee was precluded from competing on equal terms with the appellant carriers. The appellee's tariff 81 removed this inequality and established rates on the movement of the seed to the mill, the movement of the product therefrom, or the aggregate of both, identical with those available over competing carriers. (R. 8.)

The Commission, without specifying wherein the tariff provisions or the results reached through their operation were in conflict with the Act, condemned appellee's tariff No. 81 in the following language:

> "The form and manner in which respondent's tariff is published clearly does not conform to the requirements of section 6 (1) and (4). The refunding of a portion of the rate published and applied by another carrier in the form and manner as that employed by respondent is a practice made unlawful by section 1 (6) of the Act." (R. 10.)

We submit the phrase "form and manner" in connection with the context of the Commission's report of findings and conclusion therefrom is vague and meaningless. There is not one scintilla of evidence in this record of the contents of the Commission's Tariff Circular No. 20, which was alluded to in the argument of appellant carriers' counsel, nor has the Commission in its report directly or indirectly inferred that the size of paper, print, etc. of appellee's tariff did not conform to any of its rules. On the other hand, it has predicated its decision squarely upon the application of certain provisions of the Act, namely

Sections 1 (6), 6 (1), 6 (4), and 6 (7). At no point did the Commission point out wherein appellee's tariff was in violation of any of these sections.

This Court has consistently held that, for an order of the Commission to be valid, it must be based upon findings supporting its conclusions. On this point Mr. Chief Justice Hughes, speaking for the Court in *Florida* v. *United States*, 282 U. S. 194, at page 215, said:

> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (*The Beaumont, Sour Lake & Western Railway Company* v. *United States*, *ante*, p. 74), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

The pertinent parts of Section 1 (6) of the Act make it "the duty of all common carriers to establish, observe and enforce * * * just and reasonable regulations and practices affecting * * * rates or tariffs" and provides that "every unjust and unreasonable * * * regulation, and practice is prohibited and declared to be unlawful."

Clearly this section, *per se*, does not prohibit the cutback practice prescribed in appellee's tariff but makes unlawful only those practices which are unjust and unreasonable.

In his original brief, page 43, the Commission's counsel stated:

> "The Commission's findings were not directed against the *end* which the appellee's tariff was intended to accomplish." (Italics ours.)

And, at page 4 of his brief on reargument, speaking of appellee's tariff, counsel uses this language:

> "It was not condemned on the ground that the rates, minus the refund made to the shipper, were either unreasonable or unjustly discriminatory or preferential * * *."

In not one line of the report of the Commission is the practice effected by appellee's tariff described as unjust or unreasonable. Certainly a practice cannot be denominated unjust or unreasonable that accomplishes results as stated by the Commission in its report (R. 9 and 10):

> "The refunds, or cut-back, are exactly the same in amount as those of the other carriers serving the mill points. * * * The purpose of making the refund is to enable it (appellee) to compete for traffic that might otherwise move outbound over the lines that originated the seed. The originating lines hold themselves out to cut-back their local inbound rates on the seed which they originate in order to induce the shipper to move the outbound products over their lines. If it were not for the cut-back rates of the connecting lines, there would be no necessity for respondent's (appellee's) tariff as the inbound shipments move from origin points to the mills at the local rates, under separate bills of lading."

We submit that no findings of the Commission supported the conclusion that appellee's tariff violates Section 1 (6) of the Act.

The next proposition is: Does the tariff violate Section 6 (1) of the Act?

This section requires that carriers file with the Commission schedules "showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad * * * when a through route and joint rate have been established."

There is no issue in this case but that local tariffs setting

out the rates under which the cottonseed move to mill points have been duly filed and published with the Commission, nor is there any question about the proper filing and publication of joint tariffs with through routes and joint rates governing the charges for transportation of the products. The cut-back tariff of appellee, and those of appellants, are the separately established tariffs of the carriers and only prescribe rules and practices whereby allowances are made to the shippers of cottonseed products manufactured from seed that move to the mill point by way of rail. These tariffs do not name rates as the term is commonly accepted and only become operative after the movement of the products outbound under separate bills of lading have been completed. Such individual tariffs are plainly approved by Section 6 (1) in this language:

> "The schedules printed as aforesaid by any such common carrier * * * shall plainly state * * * all privileges * * * granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, * * * and charges * * *."

Tariffs containing joint rates and through routes have been established, and there is no question but that they have been properly filed, published and concurred in. Included in the appendix, as Exhibits B and C, are the omnibus clauses contained in joint tariffs to which appellants and appellee are parties.

The provisions of the joint tariffs set out in Exhibits B and C in the appendix adopt and authorize any individual practice or privilege granted by parties to the joint tariffs whereby, in their separate tariffs, the through rate may be affected so long as the carrier granting the privilege does so upon its own responsibility. We submit that the cut-back tariff 81 of appellee, though it may affect the joint outbound rate by means of the omnibus clause re-

ferred to is concurred in, if such is necessary, by all carriers party to the joint tariff.

We further submit that appellee's tariff does not violate Section 6 (4) of the Act. This section deals with joint tariffs. Appellee's tariff 81 does not purport to be a joint tariff but is the separately established individual tariff of the Columbus and Greenville Railway Company promulgating rules and practices whereby allowances are made to shippers upon compliance with the conditions specified in the tariff. These allowances are the sole responsibility of appellee and only affect its part of the revenue received from the outbound haul of cottonseed products that move under joint tariffs, duly filed and established, to which appellants and appellee are parties.

The validity of appellee's tariff without the concurrence of other carriers is confirmed by the decision of this Court in *Central Railroad Company of New Jersey v. United States*, 257 U. S. 247. We quote from the opinion, page 255:

> "Whether the privilege shall be granted or withheld is determined by local carrier. If granted, the local carrier determines the conditions; and these are set forth in the local tariff. Although a joint through route with joint rates is established by concurrent action of several carriers, the transit privilege may thus be granted by a carrier without the consent of, and without consulting, connecting carriers."

The fact that the Commission has the power to require an individual carrier party to a joint rate to establish a transit privilege is not contrary to the fact that the granting or withholding of the privilege is the responsibility of the individual carrier, and the concurrence of the other carriers is not necessary. The authority of the Commission in that instance is exercised under its broad powers to correct a situation whereby discrimination or undue prejudice or undue preference exist in regard to certain shippers or localities because of the granting of, or failure

to grant, a transit privilege. The Commission does not hold that appellee's tariff is unduly prejudicial or unduly advantageous to any shipper.

We submit further, for the sake of argument, that the failure of the appellant carriers to concur in appellee's tariff is without legal significance. But, if we are mistaken in this point, we most emphatically urge that, under the omnibus clause of the joint tariffs, as pointed out in our discussion of Section 6 (1) of the Act, the carriers parties to the joint outbound rate have concurred in the establishment of the individual transit privileges of appellee's tariff 81 so long as they remain the sole responsibility of appellee, which is the case at bar.

The omnibus clause states clearly under the heading "Terminal, Transit and Other Privileges and Charges": "The granting of the privileges * * * shall be entirely upon the responsibility and at the cost of the carrier granting the privileges * * * and without requiring the participation therein of any other carrier in the absence of authority therefor from such other carrier."

Section 6 (7) of the Act is not violated by appellee's tariff. This section in its application to the case at bar only provides that a carrier shall not engage or participate in the transportation of property without first filing and publishing its tariff of the rates and charges for same; and it prohibits any carrier from refunding or remitting in any manner or by any device any portion of the rates or charges "except such as are specified in such tariffs."

The purpose of this section was to have one rate applicable to all. It was to avoid favoritism toward one shipper as against another. We submit that the appellee's tariff gives no secret refund of any part of the transportation charge but is a published method, open to all who fulfill its requirements, and it does not result in undue preference or disadvantage to persons or traffic similarly situated. The filing and publication of the tariff fulfill the require-

ments of this section, which only prohibits refunds not specified in the tariff.

The facts in the instant case are unlike the facts in the case of *Kansas City Southern Railway Company* v. *Albers Commission Company*, 223 U. S. 573. There the suit against the Railway Company was predicated upon a special agreement embodying a rate schedule that was not filed with the Interstate Commerce Commission. In reversing the judgment of the Supreme Court of Kansas that had affirmed a lower court decision, whereby the shipper had recovered a judgment under the special rate agreement, this Court, in part, said:

> "The chief purpose of the act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements, in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed." 223 U. S. 597.

We submit the fact that appellee's tariff has been duly published and filed with the Commission removes it from any criticism that appellants might attempt to make by comparing the situation with that which existed in the Albers case above.

The appellant carriers have insisted before this Court that, if the decision of the lower court is sustained and appellee's tariff under the circumstances approved, it would create a chaotic condition in the rate structure of the country. No justification for this statement is found in the record. The Commission certainly did not indicate any such reason as a ground for its decision.

We have quoted at length, page 10 of our original brief, from the decision of this Court in *United States of America, et al.* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al.*, 294 U. S. 499. We wish again to direct the

Court's attention to that case because of its discussion of a number of points that have been raised in the case at bar. The Court there held that the disruption and disturbance of a rate structure, without more, could not be deemed a sufficient reason for taking from a carrier the privilege of reaching out for a larger share of the business of transportation and initiating its own schedule to help it in the struggle.

(2)

Assuming that this question is answered in the affirmative, would the cancellation of this tariff operate unfairly and unreasonably in view of the outstanding cut-back tariffs on freight originating on carriers with which the Columbus and Greenville Railway competes?

Although we emphatically deny the existence of any support in the record for an affirmative answer to question (1) above, we would again emphasize the extent to which cancellation of our tariff No. 81 would operate unfairly and unreasonably in view of the outstanding cut-back tariffs on freight delivered to mill points by carriers with which the Columbus and Greenville Railway competes.

The outbound products manufactured from the seed brought into the mill points over appellant carriers' lines move under separate bills of lading; that is, the seed inbound constitute a separate journey, and upon arrival at the mill point, the freight charges are paid, and all obligations between the shipper, carrier and consignee are terminated. However, though the appellee has available through routes and joint rates in tariffs to which it is a party, commonly called joint tariffs, it cannot compete on equal terms with appellant carriers if its tariff No. 81 is canceled for the reason that the appellant carriers' cut-back tariffs, by holding out a refund to the carrier in the event he ships the products over their lines, will control the business. This is emphasized by the testimony of

appellants' witness Hall, who stated in answer to questions propounded by counsel for appellee as follows:

> "Q. Now, assume that the tariff of respondent, I. C. C. No. 81, is cancelled. If that shipper elected to ship out over the C. & G. instead of over your line, wouldn't it cost him a premium?
>
> "A. No.
>
> "Q. He would not get a refund under your tariff, would he?
>
> "A. He would be silly to ship out over the C. & G.
>
> "Q. That doesn't answer the question, Mr. Hall.
>
> "A. I think it does.
>
> "Q. You said he would be silly to ship. Why should he be silly?
>
> "A. Because he would lose money."

Stenographers' Minutes Before The Interstate Commerce Commission, Docket No. 28,590, page 41.

Commissioner Splawn, in his dissenting opinion, commenting on the decision of the Commission, used this language:

> "The effect of the decision violates all principles of justness and fairness as it precludes respondent from participating in the outbound movement or in the through movement of the traffic from common origins on an equality of rates with the trunk lines." (R. 12.)

(3)

What considerations of law, procedure or policy may be urged against the Commission's following the procedure, prior to the cancellation of the tariff, of bringing other carriers into the proceeding pending before it, or into an independent proceeding, and in such proceeding making an appropriate adjustment of rates as between respondent and other carriers?

By virtue of the broad powers vested in the Commission under Section 15 of the Act, it had the authority, prior to

the cancellation of the tariff, to bring other carriers into the proceeding and there make an appropriate adjustment of the tariffs of appellants and appellee that would create a situation fair to each in their rights to compete for business originating at common mill points.

The proceeding in this case was instituted upon the Commission's own motion. Appellant carriers appeared as interveners. They had appeared as protestants in a previous hearing in I. & S. Docket No. 4599, 238 I. C. C. 309, which involved questions similar to the instant case. The record in that case was made part of the record in this case, with the distinct understanding that "the findings of fact in the prior report were not to be considered conclusive in this proceeding." (R. 6.) The appellee's case there, as here, was predicated upon the necessity of overcoming the disadvantage that appellant carriers' tariffs had placed against it in its efforts to compete on equal terms for traffic originating at common points and moving outbound under tariffs to which appellants and appellee were parties to joint rates and through routes.

The Commission indicated in its report (R. 11), that there was another method open to the appellee "to accomplish the end desired by proportional rates through procedure authorized by the statute."

It was within the power of the Commission, recognizing that the end desired by appellee was not open to criticism, to have held its decision in abeyance and have brought all necessary parties into the proceeding and effected an adjustment. Appellee urged the Commission to do this in the concluding part of its brief, which is included in Appendix A hereto.

The establishment of proportional rates, since the appellee and also the appellants in many instances do not reach the primary markets of the cottonseed products, is not practicable, and counsel for the Commission, in his original brief, recognizes this fact. But there is a simple, prac-

ticable method to effect the adjustment, which is the cancellation of the cut-back tariffs of both appellants and appellee, thereby permitting the cut-back rate on seed to become the normal rate. This would not constitute a reduction in the inbound rate on the seed. It would not reduce the carriers' revenue but would only eliminate what might be described as a penalty charge inbound that is returned to the shipper if he selects the same carrier in shipping his products outbound.

(4)

Have the courts power to require the Commission to take such procedure?

We submit any extended discussion of this question would unnecessarily prolong this brief, but it is our opinion that the courts are without power to direct the administrative functions of the Commission, which would necessarily be involved in a proceeding as suggested in question (3).

In conclusion, we submit that the question is not whether some other means were available to the appellee in accomplishing the end desired, but whether the method used violated the Act. It is appellee's position that its effort undertaken "in the manner and form" prescribed in its tariff No. 81, to gain a larger share of the business for which it is entitled to compete, is sustained by the decisions of this Court in the *Atchison Case*, the *Milwaukee Case*, and the *Central Railroad of New Jersey Case*, heretofore referred to, and that there does not emerge from the Commission's findings any violation of the Interstate Commerce Act, as amended.

Respectfully submitted,

R. C. Stovall,
*General Counsel, Columbus and Greenville Railway Company.*

Forrest B. Jackson,
*Of Counsel.*

# APPENDIX.

## EXHIBIT A.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

Cottonseed Allowances of the Columbus & Greenville Railway Company. } Docket Number 28,590.

## EXCEPTIONS OF RESPONDENT TO REPORT PROPOSED HEREIN BY EXAMINER GEORGE M. CURTIS.

"CONCLUSION.

"If the tariff I. C. C. No. 81, is to be condemned and held unlawful, then by the same token, the so-called 'cut-back rates' of interveners are unlawful and should be condemned, because such tariffs have created the conditions making necessary, under the natural law of self-preservation, the adoption of rate policy here considered.

"If the findings of the Examiner are to prevail in the conclusions reached, then, with deference, we request that final order herein be held in abeyance until such time as there may be a complete investigation and determination of the lawfulness of the 'cut-back' tariffs.

"The determination of the lawfulness of said 'cut-back tariffs and rates' may be concluded before the beginning of another season for the movement of cottonseed, and the condemnation of C. & G. Tariff No. 81 will not now affect the movement of seed during the present season since cottonseed in the area served have all practically moved to mill points or will move before effective date of an order herein.

"We, therefore, with deference, respectfully submit that these exceptions should be allowed, the tariff found lawful and the proceedings dismissed; and, if in error in this contention, then that final order be held in abeyance until fur-

ther consideration of the competitive 'cut-back rates' as to lawfulness may be had by the Commission.

"We urge that any order of this Commission holding Respondent's tariff No. 81 unlawful will be in violation of Respondent's rights as guaranteed by the Fifth Amendment to the Federal Constitution.

"Oral argument before the entire Commission is requested.

"Respectfully submitted,

COLUMBUS & GREENVILLE RAILWAY COMPANY,
By R. C. STOVALL,
*General Counsel*

FORREST B. JACKSON,
*Counsel*

"Dated at Columbus, Mississippi,
September 1, 1941."

# EXHIBIT B.

AGENT ROY POPE'S TARIFF 714, ICC 114, EFFECTIVE JUNE 1, 1936.

RULES AND REGULATIONS—GENERAL.

Item 100.

TERMINAL, TRANSIT AND OTHER PRIVILEGES AND CHARGES.

In the absence of specific provisions in this tariff to the contrary, shipments transported under this tariff will be subject to all terminal charges and services, and all allowances relating to:

Arbitraries
Car Rental
Car Service
Cleaning
Clipping
Demurrage
Diversion
Drayage
Elevation
Grading
Grain doors
Handling
Icing
Inspection
Mileage on private cars
Milling
Mixing
Overloaded cars, handling of,
Reconsignment
Refining
Refrigeration
Sacking
Shelling
Storage
Switching
Transit privileges
Wharfage

together with all other privileges, charges and rules which in any way increase or decrease the amount to be paid on any shipment between points named in this tariff, or which increase or decrease the value of the service to the shipper, as provided in tariffs published and lawfully on file with the Interstate Commerce Commission.

The granting of the privileges and performances of the services described in this item shall be entirely upon the responsibility and at the cost of the carrier granting the privileges or performing the services, and without requiring the participation therein of any other carrier in the absence of authority therefor from such other carrier.

# EXHIBIT C.

EXCERPT FROM AGENT R. H. HOKE'S MISSISSIPPI TARIFF 714-A ICC No. 322.

Item 100-B (Cancels Item 100-A of Supplement 4.)

TERMINAL OR TRANSIT PRIVILEGES OR SERVICES.

In the absence of specific provisions in this tariff to the contrary, shipments transported under this tariff will be entitled to such allowances and privileges and subject to such charges, rules and regulations of originating carriers parties to this tariff, for property while in their possession, and of any of the intermediate or delivering carriers parties to this tariff for property while in their possession, as are provided in tariffs lawfully in effect and on file with the Interstate Commerce Commission as to interstate traffic, and with State Commission covering traffic subject to its jurisdiction, for

Terminal or transit privileges or services, including also

| | |
|---|---|
| Car rental | Private car mileage |
| Car service | Reconsignment |
| Cartage | Refrigeration |
| Demurrage | Stop-off |
| Diversion | Storage |
| Elevation | Switching |
| Heater service | Transfer |
| Icing | Transit privileges |
| Lighterage | Unloading |
| Loading | Weighing |

The granting of the privileges and performance of the service described in this item shall be entirely upon the responsibility and at the cost of the carriers granting the privileges and performing the services and without affecting the revenue of any other carrier in the absence of authority therefor from such other carrier.

(Auth. DA 60785 / 12-14-38.)

# SUPREME COURT OF THE UNITED STATES.

No. 628.—October Term, 1942.

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| The Interstate Commerce Commission, J. M. Kurn, et al., Trustees, St. Louis-San Francisco Railway Company, et al., Appellants, *vs.* Columbus and Greenville Railway Company. | On Appeal from the District Court of the United States for the Northern District of Mississippi. |

[June 7, 1943.]

Mr. Justice Jackson delivered the opinion of the Court.

This case is here on direct appeal from a decree of a specially constituted District Court of three judges[1] enjoining the enforcement of an order of the Interstate Commerce Commission cancelling certain "cut-backs" on cottonseed and its products contained in appellee's I. C. C. Tariff No. 81.[2]

The appellee operates 168 miles of railway extending east and west within the State of Mississippi. Cottonseed and its products, to which the tariff in question relates, are important items of traffic in the region, and there are cottonseed mills at a number of points on appellee's line. Appellee originates about 15 or 20 per cent of the cottonseed milled there; trucks originate about 50 per cent; and the balance comes to the mills on other lines with which the appellee connects at these points, including the Illinois Central Railroad Company, the Mobile & Ohio Railroad Company, the St. Louis-San Francisco Railroad Company, and the Yazoo and Mississippi Valley Railway Company.

Since 1931, these railroads and appellee have maintained a system of cut-backs originally designed, and successively revised, for the purpose of meeting the competition of truck lines. Speaking generally, the system permitted one who shipped cottonseed into the mill point and paid the full local rate for that inbound

[1] Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219-220, 28 U. S. C. §§ 47, 47a; § 238 of the Judicial Code as amended, 28 U. S. C. § 345.

[2] 248 I. C. C. 441; 46 F. Supp. 204.

haul to receive back part of the amount so paid if he later shipped the product outbound by the same carrier. If the outbound haul was not by the carrier that had made the inbound haul, he was not entitled to the cut-back.

To better its position with respect to the outbound hauls of cottonseed originated by other lines, appellee took measures which it calls "self-help to meet competition." It sought by its I. C. C. Tariff No. 81 to establish schedules of payments to shippers which would give them the benefit of the cut-backs on cottonseed and its products shipped outbound over its line, whether the inbound haul was over its own line or over a connecting line. This tariff was neither protested nor suspended, and became effective October 16, 1938. After the Commission's Bureau of Traffic had criticized this tariff and requested its correction, appellee filed its I. C. C. Tariff No. 83, differing in immaterial particulars from its Tariff No. 81. The Commission ordered No. 83 suspended and entered upon an investigation of its lawfulness.[3]

In its report,[4] Division 3 of the Commission held: The suspended tariff was an effort to reduce the outbound joint rates, established to points beyond appellee's line with the concurrence of the participating carriers, without obtaining their concurrence in such reduction, and therefore it violated § 6(4) of the Act.[5] The suspended schedules did not "lawfully name or provide any legal rates whatsoever,"[6] and were in violation of § 6(7),[7] since the contemplated "refund would be, essentially, a rebate, whereby the property would be transported from the mill point to the destination on another line at a lower rate than that named in the joint tariff published and filed by the several carriers participating in the movement and lawfully in effect. . . . Respondent's suspended tariff, granting an alleged allowance to the shipper notwithstanding that he performs no part of the transportation ser-

[3] 15(7) Interstate Commerce Act, 49 U. S. C. § 15(7).

[4] 238 I. C. C. 309.

[5] "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties." 49 U. S. C. § 6(4).

[6] 238 I. C. C. at 315.

[7] "No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are trans-

vice, as the result of which he would obtain the out-bound transportation at less than the rates lawfully in effect would constitute an unreasonable practice, in violation of section 1(6)[8] and other provisions of the Interstate Commerce Act.''[9] Although not shown to be unlawful as applied to traffic originated and carried to the mills by appellee over its line, the tariff was defective in the proposed form, and should be cancelled.

The Commission then of its own motion entered upon an investigation of the lawfulness of appellee's I. C. C. Tariff No. 81, which had remained in effect as the result of the suspension of No. 83.

The brief and not altogether clear opinion of the full Commission concluded with the statement that ''We find that, to the extent respondent's tariff I. C. C. No. 81 provides for refund, or cut-back, to the shipper on traffic originated and hauled to the mill points by other rail carriers, it is unlawful in violation of section 1(6), section 6(4), and section 6(7) of the Interstate Commerce Act.''[10] From this and other statements contained in the opinion of the full Commission it appears that the Commission shared the views of Division 3 as to the effect of the schedule upon the outbound joint rates and the unlawfulness of that effect. The Commission's view that the tariff operated to reduce such outbound rates without the concurrence of the participating carriers is at least a tenable one, and one we are not disposed to gainsay. When that view is taken, violation of § 6(4)[11] is clear. With the impropriety of the tariff under § 6(4) established, the Commission could reasonably conclude that its operation entailed violations also of §§ 1(6) and 6(7).[12]

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ported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.'' 49 U. S. C. §6(7).

[8] ''It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce . . . just and reasonable regulations and practices affecting classifications, rates, or tariffs, . . . and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.'' 49 U. S. C. § 1(6).

[9] 238 I. C. C. at 317-318.

[10] 248 I. C. C. at 446. For the texts of §§ 1(6), 6(4) and (7), see footnotes 8, 5 and 7, *supra*.

[11] For the text, see footnote 5, *supra*.

[12] For the texts, see footnotes 8 and 7, *supra*.

Disregard of the statutory requirements for the establishment of joint tariffs may have important substantive consequences. The Interstate Commerce Act contemplates that joint railroad rates shall be established only by concurrence of the participating carriers or by the Commission in proceedings under § 15.[13] In the exercise of its power under § 15 to fix joint rates without the concurrence of the participating carriers, the Commission is required by § 15(4) to protect, in stated circumstances, the long hauls of participating carriers, and to give reasonable preference to originating carriers.[14] The appellant railroad carriers claim, with what foundation we do not decide, to be entitled to protection in both regards, and that to deny them such protection may force the abandonment of branch lines which Congress sought by amendment to § 15(4) to avoid. It is said that in recent years the Illinois Central System has already abandoned branch lines in Mississippi having greater mileage than the whole of appellee's line.[15] Division 3 found that the existing cut-back rates were "extremely low, averaging only about 8.5 percent of the first-class rates, whereas in the general cottonseed proceeding the Commission prescribed 18.5 percent of first class as reasonable, and that these low cut-back rates can be justified only in consideration of the in-bound carrier's obtaining the out-bound movement."[16] The full Commission reiterated Division 3's further finding that "In-

[13] § 15(3), 49 U. S. C. § 15(3).

[14] "In establishing any such through route the Commission shall not (except as provided in section 3 of this title, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. . . ." 49 U. S. C. § 15(4).

[15] See, e. g., Abandonment of Line By Mississippi Valley Co. and Illinois Central R. R., 145 I. C. C. 289; Abandonment of Branch Line By Y. & M. V. R. R. Co., 145 I. C. C. 393; Helm and Northwestern Railroad Abandonment, 170 I. C. C. 33; Gulf & Ship Island R. R. Co. Abandonment, 193 I. C. C. 749; Y. & M. V. R. R. Co. Abandonment, 249 I. C. C. 561; Y. & M. V. R. R. Co. Abandonment, 249 I. C. C. 613.

[16] 238 I. C. C. at 314.

stead of placing itself on an equal basis with its competitors, respondent's present effective and suspended tariffs place it in a more favorable position than any of them, since the tariffs of none of them go so far as to grant a refund to the shipper on traffic moving into the mill over the line of another carrier."[17]

Although it appears that by far the greatest part of the outbound traffic over the appellee's line moves beyond on the lines of connecting carriers at jointly established rates, it appears that some traffic does reach its ultimate destination at points along appellee's line. It was apparently with reference to this traffic that the Commission stated that "the form and manner in which respondent's tariff is published clearly does not conform to the requirements of section 6(1),"[18] which provides, *inter alia*, that "If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, . . . the separately established rates, fares, and charges applied to the through transportation."[19] The challenged tariff provided that upon shipment outbound over appellee's line "the freight charges . . . to the manufacturing or mill point will be reduced" in stated amounts, although such charges had been made by other carriers in accordance with their own tariffs for transportation over their own lines. That the Commission may hold that a carrier in "separately establishing" its rates for a portion of a through haul must not purport to alter the rates established by connecting lines, surely is a permissible construction of § 6(1).

Whether cut-backs even as applied to previous transportation over the carrier's own lines are ever permissible under the Act, we do not decide; and, like the Commission, we express no opinion whether the particular cut-backs employed by appellee's competitors are valid. We simply hold that, whatever may be the appellee's rights in appropriate proceedings, cf. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768, the appellee may not realize upon them by means which the Commission has properly found to be unlawful.

*Reversed.*

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[17] 238 I. C. C. at 313; 248 I. C. C. at 445.

[18] 248 I. C. C. at 445.

[19] 49 U. S. C. § 6(1).

Mr. Justice DOUGLAS, concurring.

Commissioner Splawn dissented from the report of the Commission in this case. 248 I. C. C. 441, 446-447. He noted that respondent's tariff "in no wise affects the amount of the rates paid for the inbound service to the mill point", its only effect being to "reduce the outbound rate and thus make applicable the same rate as applies when the outbound haul is performed entirely by the trunk lines." In his view the outbound traffic is "free" traffic as that term was used in *Atchison, T. & S. F. Ry. Co. v. United States*, 279 U. S. 768. That is to say, "it is traffic which has previously moved in on local or joint rates to the milling point and has there come to rest." Hence the fact that respondent is not a party to the inbound rates is "without legal significance." Commissioner Splawn concluded that the decision of the Commission violated "all principles of justness and fairness as it precludes respondent from participating in the outbound movement or in the through movement of the traffic from common origins on an equality of rates with the trunk lines." The fact that no other carrier is a party to respondent's tariff containing the cut-back provision and that respondent absorbs the allowances out of its proportion of the joint outbound rate was unimportant in his view. As he stated, "The identical facts are true of the tariffs and practice of at least one of the intervening trunk lines" — tariffs which concededly constituted the necessity for respondent's tariff. Moreover, as he observed, "there can be no doubt that the provision is lawful as to out-bound traffic to points reached by respondent over its line." That traffic would seem to be as "local" as the transit privilege which this Court held in *Central R. Co. of New Jersey v. United States*, 257 U. S. 247, a carrier might establish for its individual tariff, even though there was a joint through route with joint rates. So I would be inclined to support the judgment of the court below in setting aside the order of the Commission at least to the extent that the court allowed the tariff to apply on outbound traffic to points on respondent's own line.

But I am voting for a reversal of the judgment of the court below in the view that the case should be returned to the Commission for adequate findings.

Although there are two reports on this problem—one by the

full Commission and one by a division of the Commission—they have an obscurity and vagueness which two full arguments before this Court have not dispelled. Commissioner Splawn complained without success of the lack of findings under § 1(6), § 6(1), and § 6(4). But if we pass by those deficiencies and cut and sew the meager materials at hand into the pattern which we guess the Commission had in mind, there are still important questions left unanswered. (1) The tariffs containing the joint outbound rates specifically authorize "privileges, charges and rules" to be covered by separate tariffs even though the joint or through rate is affected, provided the carrier granting the privilege does so upon its own responsibility and at its own cost. We are not informed why that provision does not authorize appellee's proposed tariff at least to the extent that it applies to outbound traffic to points on appellee's line. (2) If concurrence of the other carriers to appellee's tariff is necessary, we are not told why the foregoing provision of the joint tariff is not adequate. (3) In case that provision of the tariff covering joint rates is not applicable, there is another phase of the problem which is in the dark. The Commission does not seem to deny that this traffic was "free" traffic within the rule of *Atchison, T. & S. F. Ry. Co.* v. *United States, supra*. It was merely concerned with the "form and manner" of the tariff. But we are not told why appellee's tariff is not within the rule of *Central R. Co. of New Jersey* v. *United States, supra*, so far as the tariff specifies the rate from milling points to destinations on appellee's line. The rule governing the right of carriers to initiate rates has not changed. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506.

Mr. Justice Cardozo speaking for the Court stated in that case, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." 294 U. S. p. 511. That was said about another obscure and vague report of the Interstate Commerce Commission. We should say the same thing about the present report. The questions left unanswered by this report may be simple ones to experts. But we should have those answers before we put the imprimatur of this Court on the Commission's order.

Mr. Justice BLACK, Mr. Justice MURPHY, and Mr. Justice RUTLEDGE join in this opinion.